



# CONSULTATION WITH NATIVE AMERICANS

## BACKGROUND

This information brief provides basic information on consultation and describes a uniform process for implementing constitutional, legislative, and executive mandates for consulting with American Indian and Alaska Native tribal governments (hereafter collectively called Native Americans). Pursuant to the special relationship between the United States Government and Tribal Governments, this information brief is intended to assist Department of Energy (DOE) managers in fulfilling their consultation responsibilities, building stable and enduring relationships with tribes, and ensuring that their decision making is effective in achieving consultation mandates and goals. This information brief consolidates and summarizes information from existing laws, regulations, and Federal agency guidance documents and policies and does not contain any new departmental policy or guidance.

## STATUTES

Native American Graves Protection and Repatriation Act of 1990

Archeological Resources Protection Act of 1979, as amended

American Indian Religious Freedom Act of 1978

National Environmental Policy Act of 1969

National Historic Preservation Act of 1966, as amended

## EXECUTIVE ORDERS AND MEMORANDA

Executive Order 13175. *Consultation and Coordination with Indian Tribal Governments*, November 6, 2000.

Executive Order 13007. *Indian Sacred Sites*. May 24, 1996.

Executive Memorandum. *Government-to-Government Relations with Native American Tribal Governments*. April 29, 1994.

Executive Order 12898. *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. February 11, 1994.

## REGULATIONS AND DOE DIRECTIVES

Advisory Council on Historic Preservation. *Protection of Historic Properties* (36 CFR Part 800).

Office of Environment, Safety and Health (EH). *Environmental Guidelines for Development of Cultural Resource Management Plans - Update*. DOE G 450.1-3. September 22, 2004.

Office of Environment, Safety and Health (EH). *Department of Energy Management of Cultural Resources*. DOE P 141.1. May 2, 2001.

Office of Congressional and Intergovernmental Affairs (CI). *American Indian and Alaska Native Tribal Government Policy*. October 2000.

Office of Congressional and Intergovernmental Affairs (CI). *American Indian Tribal Government Policy*. DOE O 1230.2. April 4, 1992.

## REFERENCES

### U.S. Department of Energy:

Office of Intergovernmental and Public Accountability (EM-11). *A Guide for DOE Employees. Working with Indian Tribal Nations*. December 2000.

National Nuclear Security Administration, Los Alamos Area Office. *A Comprehensive Plan for the Consideration of Traditional Cultural Properties and Sacred Sites at Los Alamos National Laboratory, New Mexico*. August 2000.

Idaho Operations Office. *Draft Consultation Procedures, Interaction and Formal Consultation Procedures for Undertakings Involving Native American Cultural Resources on the INEEL*. August 10, 1999.

### U.S. Department of Interior:

National Park Service (NPS). *Native American Consultation*. National NAGPRA Native American Consultation Database. April 2003.

Bureau of Reclamation (BOR). *Protocol Guidelines: Consulting with Indian Tribal Governments*. February 1998. Revised February 2001.

Bureau of Indian Affairs (BIA). *Government to Government Consultation Policy*. December 2000.

National Park Service (NPS). *Speaking Nation to Nation: Fulfilling Our Promise to Native Americans. COMMON GROUND, Summer/Fall 1997; Volume 2, Issues 3 and 4*.

The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act. (Section 110 Guidelines) 63 FR 20495. April 24, 1998.

Bureau of Land Management (BLM). *General Procedural Guidance for Native American Consultation*. November 1994.

### Advisory Council on Historic Preservation:

*Consulting with Indian Tribes in the Section 106 Review Process*. April 2003.

### Others:

State and Tribal Government Working Group. *Draft Outline for Policy Implementation Plan*. July 2001.

American Indian Writers Subgroup, Consolidated Group of Tribes and Organizations. *American Indian Resource Document: American Indian Perspective on the Yucca Mountain Site Characterization Project and the Repository Environmental Impact Statement*. February 1998.

Wolfley, Jeanette, Shoshone Bannock Tribe. *Toward Consultation That Works*. November 1996.

## CONSULTATION DEFINED

As defined by DOE's policy on the Management of Cultural Resources (DOE P 141.1), consultation is a government-to-government process of seeking, discussing, and considering the views of others on a wide range of environmental and cultural resource management issues. DOE's *American Indian & Alaska Native Tribal Government Policy* states that "Consultation includes, but is not limited to: prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship." Establishing and maintaining this process is pivotal to ensuring that environmental, cultural, and historical values are preserved for future generations.

Consultation is, however, an interaction that goes beyond notification and reporting information. It is an on-going activity, based on mutual respect and timely involvement. (McKeown, in NPS 1997).

## CONSULTATION REQUIREMENTS

The United States Constitution, treaties, Executive orders, Federal statutes, Federal policies, and tribal requirements establish the dynamic interaction that must take place between Federal and tribal governments. The most important basis for this relationship is the trust responsibility of the United States to protect tribal sovereignty, self determination, tribal lands, tribal assets and resources, and treaty and other federally recognized and reserved rights. Since 1990, a growing number of statutes and Executive orders specifically require Federal agencies and departments to consult directly with Native American governments on a government-to-government basis. Legislative and executive actions that mandate consultation include the National Historic Preservation Act (NHPA), National Environmental Policy Act (NEPA), American Indian Religious Freedom Act (AIRFA), Archeological Resources Protection Act (ARPA), Native American Graves Protection and

Repatriation Act (NAGPRA), and Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*.

Consultation is required when Federal government decisions affect Native American tribal governments or their people, i.e., when (1) any tribe may be affected by federally funded undertakings on or off federally owned lands; (2) tribal members live on or near or use lands where federally funded undertakings may occur; or (3) tribes still have treaty rights and/or ancestral affiliation to lands affected by federally funded undertakings, even though they no longer live there.

Federal agencies are required to consult with Indian tribes if a property eligible for inclusion on the National Register of Historic Places having religious or cultural significance may be affected by an undertaking as defined under Section 106 of NHPA. The State Historic Preservation Officer and/or the Tribal Historic Preservation Officer must be involved in these consultations, and the consultation must follow a specific process. The Advisory Council on Historic Preservation has prepared an excellent summary of the Section 106 process (*Consulting with Indian Tribes in the Section 106 Review Process*) that may be found on their website at [www.achp.gov/regs-tribes.html](http://www.achp.gov/regs-tribes.html).

The Bureau of Reclamation's *Protocol Guidelines: Consulting with Indian Tribal Governments, Appendix B: Legal and Policy Requirements for Consultation* provides a synopsis of each major legal requirement. Also, it references pertinent sections of either the United States Code or the Code of Federal Regulations. This document is available online at <http://www.usbr.gov/native/naao/policies/protguide.pdf>.

## IDENTIFICATION OF PARTICIPANTS IN THE CONSULTATION PROCESS

Various statutes including, but not limited to, ARPA, NAGPRA, NEPA, and NHPA and their corresponding regulations require consultation with one or more of the following:

- Officials or elected leadership of federally recognized tribal governments (including Alaska Native corporations),
- Representatives of non-federally recognized Indian communities,

- Traditional cultural or religious leaders and practitioners, and
- Lineal descendants of deceased Native American individuals whose remains are in federal possession or control.

The Bureau of Indian Affairs (BIA) list of federally recognized tribes is the best starting point for identifying tribes with which the United States has a government-to-government relationship. The BIA continually updates their database, and most likely has the most up-to-date listings. A Tribal Leaders Directory is available by contacting the BIA at (202) 208-3711. In addition to the list of recognized tribes, BIA Area Offices maintain a supplemental list of non-recognized Indian groups that are petitioning for federal recognition.

States can provide a list of state-recognized tribes or organizations. These lists are not exhaustive, however, and must be augmented by information from other sources. For example, BIA's Area Offices can be contacted to obtain updated and additional information on tribal governments and other Native American organizations in their general vicinity. Other sources that can be called upon to help to develop a tribal contact list include archeologists in the Bureau of Land Management field and state offices; the state Department of Transportation environmental coordinator; other Federal, state, and local government agencies that provide programs and services to Native Americans; local Native American cultural and ombudsman organizations; and ethnographers, ethnohistorians, and anthropologists in universities and professional organizations.

Each DOE site should develop and maintain lists of the tribal officials and traditional religious leaders who have been designated by tribal governments to serve as contacts for notification and consultation. The list should also include other individual Native Americans and representatives of Native American groups that are interested in proposed agency actions. Tribes and groups with historic ties to the lands in question, even if they are no longer locally resident, should be included and given opportunities to identify a contact person(s) and to describe their interests in the project or program activity in order to ensure protection of the resource.

The Department's responsibility to notify and consult with Native Americans cannot be assigned or delegated to any other party. In some circumstances cultural resource consulting firms might appropriately be approved to make contacts and collect information (e.g., to identify traditional cultural properties for purposes of NHPA Section 106 compliance). They cannot, however, negotiate, make commitments, or otherwise give the appearance of exercising the Federal government's authority in consultation.

## CONSULTATION PROCESS SUMMARY

Consultation involves specific American Indian and Alaska Native Tribal Governments, non-federally recognized tribal governments, and concerned Native American groups and individuals who request participation in the process. The following guidelines may be used for developing effective consultation:

- DOE managers are responsible for implementing a tribal identification process, ensuring that government-to-government consultations are established with all appropriate tribal governments (DOE P 141.1).
- Tribal consultation must occur through a formal, documented, government-to-government process that is consistent with DOE's American Indian and Alaska Native Tribal Government Policy (DOE O 1230.2). The initiation of the formal consultation process may involve letters, frequent follow up telephone calls, and office visits. When those consulted do not routinely or customarily participate in traditional governmental means of consultation (e.g., through public meetings, exchanges of correspondence), reasonable efforts should be made to accommodate their cultural values and modes of communication (Section 110 Guidelines).
- Consultation should take place early in the planning process of the proposed undertaking (NHPA Section 110 Guidelines, DOE P 141.1). However, there are no overall hard and fast time limits on consultation.
- Initial meetings should identify the applicable DOE rules, processes, and schedules and the interests of all parties. The cultural interests, concerns, and constraints of the participants must be recognized early in the consultation process.



- DOE managers should consider all concerns, comments, or recommendations made by tribal governments and address each issue (DOE P 141.1). Consultation focuses on identifying solutions that will satisfy all of the parties. It should explore the full range of project options and continue until either an agreement is reached among the participating parties or it is clear that an agreement cannot be reached.
- When a project is completed, the consultation process should be documented including consultation options considered and agreements reached, points of contact, meeting locations, and tribal concerns and issues. A letter detailing the outcome of the consultation process should be distributed to applicable Federal, state, and local governments and DOE support contractors. This record can be used to facilitate future consultations.

## LEVELS OF CONSULTATION

A flexible approach to consultation should be taken because there can be different levels of activity involving cultural tribal resources and the environment at a particular site. The Bureau of Reclamation, in *Protocol Guidelines: Consulting with Indian Tribal Governments*, describes two levels of consultation:

- A “formal communication on a government-to-government basis. It is conducted between the leaders of tribal governments and senior representatives from the federal government. After a relationship has been developed, agreements may be reached that recognize and sanction communications between federal-tribal designated representatives. A key component of this type of consultation is the federal government's recognition of tribal sovereignty.”
- “Communication that frequently occurs between federal-tribal middle level management and technical staff at meetings, through telephone contacts, and during on-site visits. Although generally not recognized by tribes as communication on a government-to-government basis, it serves as a useful conduit for sharing information, satisfying certain legal requirements, and developing relationships.”

## MAINTAINING A WORKING RELATIONSHIP

After an initial consultation, it may be useful to establish a long term agreement on a mutually agreed upon Federal-tribal protocol for conducting consultation and maintaining a government-to-government relationship. This protocol agreement should (1) assure that appropriate levels of DOE leadership interact with tribal leadership, (2) establish procedures and designate representatives with authority for conducting consultation on a government-to-government basis, (3) ensure timely and open lines of communication, (4) clarify expectations and promote the recognition of tribal and DOE interests, and (5) build opportunities for developing partnerships and working collaboratively on DOE-related projects. Several DOE sites have agreements with tribal governments to maintain long term working relationships. Additional information regarding these site agreements can be found at the cultural resources website: <http://www.eh.doe.gov/oepa/cultural/>.

**Questions of policy or questions requiring policy decisions will not be addressed in EH-41 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to Lois Thompson, Office of Air, Water and Radiation Protection Policy and Guidance, EH-41, (202) 586-9581; fax: (202) 586-3915; e-mail: [Lois.Thompson@hq.doe.gov](mailto:Lois.Thompson@hq.doe.gov).**